No. 98-359

Supreme Court, U.S.
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In The

# Supreme Court of the United States

October Term, 1997

BARNEY DOYLE, et al. and
JOSEPH CUNETTA, et al.,

*Petitioners,*

v.

BELLSOUTH TELECOMMUNICATIONS, INC. and
BELLSOUTH COMMUNICATION SYSTEMS, INC.,

*Respondents.*

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit**

## RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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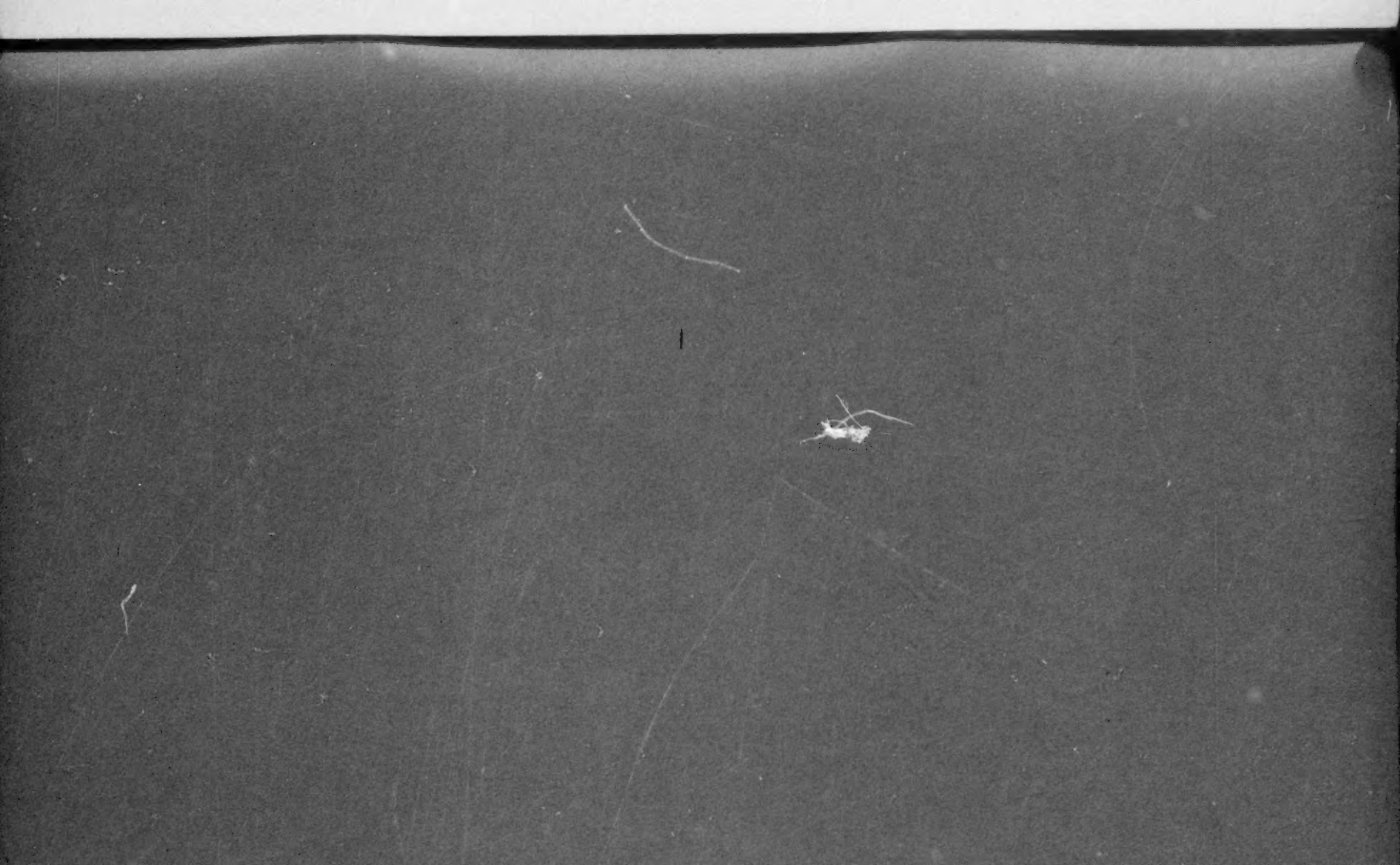

## QUESTIONS PRESENTED:

1. May Petitioners raise before this Court an argument which they specifically waived before the United States Court of Appeals for the Sixth Circuit?

2. Is certiorari appropriate to hear Petitioners' constitutional attack on a federal statute when neither Petitioners, nor the District Court, nor the Circuit Court, timely notified the Attorney General of the constitutional attack to allow the United States to intervene, in contravention of 28 U.S.C. § 2403(a) and Federal Rule of Appellate Procedure 44?

3. Was the District Court's application of existing law in granting BST summary judgment a "retroactive" application of the law, and, if so, was that "retroactive" application of the law constitutional?

## LIST OF PARTIES

RESPONDENT BELLSOUTH TELECOMMUNICATIONS, INC.

| | |
|---|---|
| Its Parent company: | BellSouth Corporation |
| Its Partially-owned subsidiaries: | Movicel S.A.<br>1155 Peachtree Associates |

RESPONDENT BELLSOUTH COMMUNICATION SYSTEMS, INC.

| | |
|---|---|
| Its parent company: | BellSouth Telecommunications, Inc. |
| Its partially-owned subsidiaries: | None |

PLAINTIFFS/PETITIONERS (Note that there is a dispute about which individuals are parties. Plaintiffs/Petitioners filed approximately 2000 "opt-in" notices which Defendants/Respondents moved to strike on a variety of grounds. The District Court granted Defendants summary judgment without ruling on those motions to strike.)

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## I. REASON FOR DENYING THE WRIT

BellSouth Telecommunications, Inc., and BellSouth Communication Systems, Inc., (collectively, "BST") respectfully submit that Petitioners' Petition for Writ of Certiorari should be denied for three reasons. First, Petitioners improperly seek to raise before this Court an argument that they specifically waived before the United States Court of Appeals for the Sixth Circuit. Second, in contravention of 28 U.S.C. § 2403(a) and Fed. R. App. P. 44, Petitioners attempt a constitutional attack on a federal statute, yet neither Petitioners nor the District Court nor Circuit Court timely notified the Attorney General of the constitutional attack to allow the United States the opportunity to intervene. Third, the District Court's application of existing law to dismiss Petitioners' pending case was not "retroactive" application of the law, and was, in any event, constitutionally correct.

BST also asks that the Court impose all costs and fees which it legitimately can on Petitioners to discourage frivolous petitions for writs of certiorari such as this one and to defray BST's expense in responding to this frivolous petition.

## II. FACTUAL BACKGROUND

### A. Description Of The Home Dispatch Program:

Respondent BST is a telephone company which operates in a nine-state area in the Southeast. Petitioners are BST employees who borrowed BST vehicles to commute to work. Petitioners who participated in this "home dispatch" program allege that the time they spent commuting from home to work and from work to home in BST's

vehicles constituted compensable hours worked under the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.* Almost all home-dispatch participants were telephone technicians whose work required them to travel to trouble spots to make repairs. Home-dispatch participants received their assignments on a hand-held computer terminal at home in the morning or called in from home to receive their assignments. They then got in their borrowed BST trucks and traveled to their respective first assignments. At day's end they traveled home in their BST trucks, which they parked at their homes for the night.

Home dispatch was a negotiated provision of a collective bargaining agreement between BST and Communications Workers of America, AFL-CIO, Petitioners' Union. The Union agreed that the commuting time was not compensable, and that provision was incorporated in the contract.

Home dispatch was completely voluntary. Employees who chose not to participate in the program drove their personal cars to a BST yard, where they received their first assignments and picked up their BST trucks.

The home-dispatch program was popular with employees because it saved commuting wear and tear on their personal cars and in many instances allowed households to manage with one fewer car. Employees were even allowed to run personal errands in their borrowed trucks on the way to and from work as long as those errands did not significantly lengthen their commute. BST benefitted too, because home dispatch increased productivity and because BST could divest some vehicle

storage facilities. The Seventh Circuit, examining a home-dispatch program operated by another telephone company which was in most respects identical to BST's, pronounced the program a "win-win" situation. *Baker v. GTE North, Inc.*, 110 F.3d 28, 29 (7th Cir. 1997).

### B. The Department Of Labor's Vacillations On The Compensability Of Travel Time And The Resulting Passage Of The Employee Commuting Flexibility Act:

This case (and similar suits against other companies) arose because of an August 5, 1994, Department of Labor ("DOL") opinion letter which contradicted the DOL's long-standing position that commuting time in an employer-owned vehicle is not compensable hours worked. That opinion letter was swiftly suspended (October 19, 1994, letter from Secretary of Labor Robert Reich, attached as Appendix pp. 1-2) and was superseded with a new opinion letter which restored the *status quo ante*. (April 3, 1995, DOL opinion, letter attached as Appendix pp. 3-4.) However, many lawsuits – this one among them – were filed in the interim.

In response to this situation, Congress introduced remedial legislation on a bipartisan basis in March, 1995. That legislation, now enacted as the Employee Commuting Flexibility Act ("the Act"), P.L. 104-188, §§ 2101-2103, amends Section 4(a) of the Portal-to-Portal Act, 29 U.S.C. § 254(a), to make clear that commuting in an employer-owned vehicle does *not* constitute compensable hours worked. President Clinton signed the Act into law on August 20, 1996.

Section 201 of the Act adds the following language to the Portal-to-Portal Act:

> For purposes of this subsection, the use of an employer's vehicle for travel by an employee and activities performed by an employee which are incidental to the use of such vehicle for commuting shall not be considered part of the employee's principal activities if the use of such vehicle is within the normal commuting area for the employer's business or establishment and the use of the employer's vehicle is subject to an agreement on the part of the employer and the employee or representative of such employee.

**C. The Act States That It Applies To Pending Cases:**

By its terms, the Act governs this pending action and all actions pending at the time the Act was enacted. As Section 202 of the Act states:

> The amendment made by section 1 shall take effect on the date of the enactment of this Act and *shall apply in determining the application of Section 4 of the Portal-to-Portal Act of 1947 to an employee in any civil action brought before such date of enactment but pending on such date.*

(Emphasis added.)

The case at bar was pending on the date of the Act's enactment. Thus, the Act's provision specifying the Petitioners' commutes in borrowed BST trucks are not principal activities under the Fair Labor Standards Act (and are therefore noncompensable) applies to this action. As discussed below, it is debatable whether this language was

even necessary in order for the Act to apply to cases pending at the time of its passage; nevertheless, Congress' inclusion of this language removes all doubt about Congressional intent.

### D. Plaintiffs/Petitioners Attack The Constitutionality Of The Act In District Court, Then Abandon Their Constitutional Attack Before The Court Of Appeals:

BST moved for summary judgment based on the Act. Petitioners attempted to avoid summary judgment by arguing that the Act's mandate that it applied to any case pending on the date of its enactment was unconstitutional "retroactive" legislation. (*See*, Plaintiffs' Memorandum of Law in Opposition to Defendants' Motions for Summary Judgment Premised on P.L. 104-188, §§ 2101-2103, filed November 15, 1996, District Court Docket No. 195, Appendix pp. 5-26.) They contended before the District Court that because of "the absence of the requisite legislative findings, the Due Process Clause of the Fifth Amendment . . . bars the [Act's] retroactive application. . . . " (*Id.* at p. 6.) It is unclear what Petitioners' confusing reference to constitutional effect of "the requisite legislative findings" means. In any event, the District Court rejected this argument and granted BST summary judgment on December 3, 1996.

On appeal, Petitioners completely abandoned their constitutional attack on the Act. Instead, Petitioners presented to the appellate court a charge that the District Court misapplied the "normal commuting area" language of the Act. Petitioners did not present this issue to the

District Court, and Petitioners candidly admitted in oral argument before the Court of Appeals for the Sixth Circuit that they conceived the issue only after new counsel joined them for the appellate brief.[1] The Court of Appeals denied Petitioners' appeal, ruling, "The failure to raise the issue below [relating to the Act's "normal commuting area" language's application to the Petitioners' situation] is fatal to plaintiffs' appeal." *Doyle et al. v. BellSouth Communications Systems, Inc. et al.*, CA 97-5122, 1998 WL 165149, at *3 (6th Cir., April 3, 1998).

Neither the District Court nor Petitioners notified the United States Attorney General of Petitioners' attack on the Act's constitutionality, in contravention of 28 U.S.C. § 2403(a). This statute requires the Attorney General to be notified of any challenge to the constitutionality of any federal statute so that the United States may intervene in the action to defend the statute's constitutionality. (This point is discussed in more detail below.) Furthermore, because Petitioners abandoned their constitutional attack before the appellate court, they did not comply with Fed. R. App. P. 44, which requires a party questioning a statute's constitutionality "to give immediate notice in writing to the court of the existence of said question," to allow the court to certify the fact to the United States Attorney General. Again, the United States was denied notice to allow it to intervene in this action.

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[1] Petitioners' abandonment of their constitutional attack likely was influenced by the Seventh Circuit's opinion in *Baker*, 110 F.3d at 29, which ruled that the Act's application to pending litigation was completely proper and also ruled that such a constitutional challenge to the Act on taking and due process grounds could be disposed of "without ado."

Now Petitioners seek to resurrect their constitutional attack on the Act before this Court, even though they did not present the issue to the Court of Appeals. The sole basis for their Petition for Writ of Certiorari is that the alleged "retroactive" application of the Act to this litigation is allegedly an unconstitutional taking of a property without due process, contrary to the United States Constitution.

## III. LEGAL ARGUMENT

There are three independent grounds on which the Petition for Writ of Certiorari should be denied. First, Petitioners seek certiorari to raise an issue which they specifically abandoned before the Court of Appeals and which that court neither considered nor ruled upon. This issue may not now be raised before this Court. Second, Petitioners failed to take the steps necessary to notify the United States Attorney General in a timely manner that Petitioners sought to attack the constitutionality of a federal statute, as required by 28 U.S.C. § 2403(a) and Fed. R. App. P. 44. Third, Petitioners' assertion that the Act is a "retroactive" taking without due process is mistaken, and the case which Petitioners cite in support of this position is inapposite to this case. Each of these points is addressed in turn below.

**A. Petitioners' Failure To Raise Any Constitutional Challenge Before The Court of Appeals Prevents Them From Raising Such A Challenge Before The Supreme Court:**

Petitioners contend before this Court that the Act's express application to pending cases (which Petitioners incorrectly call a "retroactivity provision") is unconstitutional because it effects a taking without due process in contravention of the Fifth and Fourteenth Amendments. Petitioners specifically abandoned this constitutional challenge on appeal before the Court of Appeals, and it should be deemed waived. Petitioners frankly admit that had they pursued their constitutional challenge before the Court of Appeals, they would have been "concerned that sanctions could be imposed against them [for a frivolous appeal] pursuant to Rule 38, Federal Rules of Appellate Procedure. . . . " (Petition for Writ of Certiorari, p. 13; hereafter, "Petition, p. ___.")

Petitioners attempt to excuse their failure to raise their constitutional challenge in the court below by arguing that, until this Court's recent decision in *Eastern Enterprises v. Apfel*, ___ U.S. ___, 118 S. Ct. 2131, 141 L. Ed. 2d 451 (1998), there was not "a single reported decision declaring a federal statute unconstitutional by reason of its retroactivity. . . . " (Petition, p. 13.) Petitioners assert that they could not raise their retroactivity issue until the Supreme Court decided *Eastern Enterprises*, which Petitioners contend created "new law" on the subject of

retroactivity.[2] As the Petition states at pp. 18-19, "*Eastern Enterprises* stands as this Court's first invalidation of federal legislation by reason of its retroactivity. Petitioners, in prosecuting their appeal to the Sixth Circuit, could not have anticipated such a dramatic development in this Court's approach to the Takings and Due Process Clauses of the Fifth Amendment to the Constitution."

As an initial matter, it is interesting that Petitioners felt no compunction against presenting the constitutional issue to the District Court, even though Petitioners now allege that their issue had no legal support until *Eastern Enterprises* was decided more than a year after the District Court granted BST summary judgment, and even though Petitioners state that they could not argue retroactivity to the Court of Appeals without risking sanctions for pursuing a frivolous appeal. (Petition, p. 13.)

Leaving that point aside, however, Petitioners' assertion that *Eastern Enterprises* was the first time the Supreme Court had struck down a retroactive statute on takings and due process grounds is flatly wrong. Many cases have struck down a retroactive statute on takings and due process grounds. *See, e.g., Untermyer v. Anderson*, 276 U.S. 440, 48 S. Ct. 353, 72 L. Ed. 645 (1928); *Railroad Retirement Bd. v. Alton R.R. Co.*, 295 U.S. 330, 55 S. Ct. 758, 79 L. Ed. 1468 (1935); *Stewart v. Keyes*, 295 U.S. 403, 55 S. Ct. 807, 79 L. Ed. 1507 (1935). In light of these cases,

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[2] As is discussed below, Petitioners' reliance on *Eastern Enterprises* is misplaced.

Petitioners' allegation that they *could not* raise the retroactivity issue until this Court decided *Eastern Enterprises* is specious.[3]

Finally, regardless of the reason for Petitioners' abandonment of their constitutional attack, the fact that they did abandon it means Petitioners may not resurrect the issue before the Supreme Court. It is axiomatic that an issue not presented to the Court of Appeals may not be raised before the Supreme Court. "Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them." *Pennsylvania Dept. of Corrections v. Yeskey*, ___ U.S. ___, 118 S. Ct. 1952, 1956, 141 L. Ed. 2d 215 (1998), *quoting Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147, n.2, 90 S. Ct. 1598, 26 L. Ed. 2d 142 (1970).

Because Petitioners seek to present an issue to the Supreme Court which the Court of Appeals for the Sixth Circuit did not consider, their Petition for Writ of Certiorari is improper and should be denied.

**B. Petitioners' Constitutional Argument Is Not Properly Before This Court Because The Attorney General Was Not Notified In A Timely Manner:**

As described above, Petitioners argued and lost the constitutional issue before the District Court. However, this issue was not even properly raised before the District

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[3] The issue in *Railroad Retirement Board* was in fact very similar to that in *Eastern Enterprises:* whether Congress could impose retroactive pension liability on a company.

Court because neither Petitioners nor the District Court notified the Department of Justice prior to challenging the statute's constitutionality, as is required by 28 U.S.C. § 2403(a). Because of this failure to notify the United States of the constitutional challenge, the United States did not have the opportunity to intervene at the District Court level[4] and present its arguments in favor of the statute's constitutionality.

Petitioners also did not certify their constitutional question to the Sixth Circuit, in contravention of Fed. Rule App. P. 44. This failure too is fatal to their quest for certiorari. In a case attacking the constitutionality of the same statute which is at issue in the present matter, the Seventh Circuit noted that the failure to comply with Rule 44 created doubt as to whether the constitutional attack could even be presented before the Court of Appeals. *Baker,* 110 F.3d at 30.[5]

The record is thus not fully developed and this matter is not ripe for certiorari. This failure to provide statutorily-required notice to the United States at either the District Court or Court of Appeals level militates against this Court hearing Petitioners' constitutional attack on the Act.

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[4] Petitioners belatedly notified the Department of Justice of their constitutional challenge only after they took the initial steps to obtain a Writ of Certiorari before this Court.

[5] The Seventh Circuit nevertheless ruled that it could dispose of the constitutional attack "without ado."

### C. Petitioners' Retroactivity Argument Is Meritless:

#### 1. The Act Clarified Existing Law and Did Not Retrospectively Reverse Established Rights:

Although Petitioners claim that the Act is "retroactive" and also claim that the statute's alleged retroactive effect is unconstitutional, Petitioners' use of the word "retroactive" is incorrect in the context of this case. The Act did not undo a final court decision or otherwise reach back in time to upset parties' established legal rights or expectations. Instead, Petitioners sued to establish a new right, alleging that ambiguities in the Portal-to-Portal Act and inconsistent enforcement by the Wage-Hour Division of the DOL should be resolved in Petitioners' favor to entitle them to an undeserved windfall, even though Petitioners: (a) volunteered to borrow company vehicles; (b) knew their Union agreed that the commuting time was not compensable hours worked; and (c) themselves benefitted from home dispatch by not having to use a personal vehicle for commuting.

In rejecting Petitioners' claims, the District Court simply applied the law which was in effect at the time of its decision. It has long been established that courts must apply the then-current law absent some direction to the contrary from Congress; the fact that the law was enacted after a case was filed is of no moment. *Bradley v. School Board of City of Richmond*, 416 U.S. 696, 711, 94 S. Ct. 2006, 40 L. Ed. 2d 476 (1974) ("We anchor our holding in this case on the principle that a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is a statutory

direction or legislative history to the contrary."). *See also, Thorpe v. Housing Auth. of the City of Durham*, 393 U.S. 268, 281, 89 S. Ct. 518, 21 L. Ed. 2d 474 (1969) (same).

Even in the absence of the so-called "retroactivity" provision in the Act which Petitioners challenge, the result in this case would have been the same. The District Court would have applied the new legislation to the then-pending case, in accordance with Supreme Court precedent, and the case would have been dismissed on summary judgment. Petitioners' allegations regarding "retroactivity" are thus misplaced. Retroactivity is actually not even an issue in this matter, and there is certainly no colorable argument that application of the then-current law to a pending case in any sense implicates constitutional taking or due process. Petitioners' Petition for Writ of Certiorari should be rejected on this independent basis.

**2. The Act Is A Constitutionally Sound Exercise Of Congress's Power To Pass Retroactive Legislation; Petitioners' Due Process Argument Is Misplaced:**

Even assuming the Act is "retroactive," it is still valid. Its application to the present matter was proper, and Petitioners' due process argument is meritless.

Petitioners correctly state that it has long been Supreme Court precedent that Congress may pass legislation with retrospective effect. (Petition, p. 13.) There is a well-established line of cases holding that Congress has the constitutional authority to enact retrospective legislation. *See, e.g., Landgraf v. USI Film Products*, 511 U.S. 244,

114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994) ("Where the Congressional intent [regarding retroactivity] is clear, it governs. . . . "), *quoting Kaiser Aluminum & Chemical Corp. v. Bonjourno*, 494 U.S. 827, 836-837, 110 S. Ct. 1570, 108 L. Ed. 2d 842 (1990). The Act is one of myriad "legislative Acts adjusting the burdens and benefits of economic life." *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15, 96 S. Ct. 2882, 49 L. Ed. 2d 752 (1976). Such legislation "come[s] to the Court with a presumption of constitutionality, and . . . the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way." *Id.* "[T]he strong deference accorded legislation in the field of national economic policy is no less applicable when that legislation is applied retroactively." *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 729, 104 S. Ct. 2709, 81 L. Ed. 2d 601 (1984). Retrospective application of economic legislation meets the test of due process simply if "retroactive application of the legislation is itself justified by a rational legislative purpose." *Id.* at 730 "[J]udgments about the wisdom of such legislation remain within the exclusive providence of the legislative and executive branches," and should not be second-guessed by courts. *Id.* at 729.

Petitioners did not make any effort to show that Congress acted irrationally in passing the Act, and that omission alone is fatal to their constitutional attack and their Petition for Writ of Certiorari. Indeed, far from being irrational, there are many rational legislative purposes for the Act. Judge Easterbrook, writing for the Seventh Circuit and approving the Act's constitutionality against an attack on due process grounds, identified two

such rational purposes: the Act conforms law to contract (remember that Petitioners' collective bargaining contract stated that home-to-work commuting in borrowed BST trucks was non-compensable), and the Act resolves an ambiguity in the Portal-to-Portal Act's use of the words "principal activities." *Baker*, 110 F.3d at 30. Other rational purposes for the Act include conforming the law to the DOL's long-standing enforcement position and clarifying that employees and employers may take advantage of the "win-win" benefits of borrowing an employer's vehicle for commuting.

Petitioners' inability to make even the slightest showing that Congress acted irrationally dooms their constitutional attack on due process grounds. Because their constitutional attack is frivolous, their Petition for Writ of Certiorari to review this constitutional question should be denied.

### 3. The Act Does Not Effect A Taking Under The Law:

Even assuming that the Act does not conform to due process, Petitioners' constitutional attack is still meritless as there is no evidence in the record that the Act effects an unconstitutional taking. The Court identified three factors in *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978), for determining when a law effects a taking. The factors examine the economic impact of the regulation, the extent to which it interferes with investment-backed expectations, and the character of the governmental action. *Id.* at 124. Petitioners presented no evidence at any stage of this

litigation that the Act had any economic impact on them or that the Act interfered with Petitioners' investment-backed expectations. Indeed, it would be extraordinary if Petitioners could make even the slightest showing on either point because Petitioners volunteered for the home dispatch program with the contractual understanding that they would *not* be paid for their commuting time. The existence of the contract answers the inquiry into the Petitioners' expectations. The contract's agreement that commuting time would not be paid was in conformity with the then-current DOL enforcement position. The Act took nothing from Petitioners. Indeed, the Act prevented Petitioners from receiving an unanticipated windfall.[6]

Because there was no taking, Petitioners' constitutional attack is frivolous on this separate ground and a writ of certiorari should be denied.

**4. This Court's Opinion In Eastern Enterprises Does Not Alter The Prior Law:**

Despite the plethora of Supreme Court decisions holding that retrospective legislation is entirely proper, Petitioners now assert that the Court's recent plurality opinion in *Eastern Enterprises v. Apfel*, ___ U.S. ___, 118 S. Ct. 2131, 141 L. Ed. 2d 451 (1998), reverses established precedent and justifies certiorari in this case. This assertion that *Enterprises* overturns all prior Supreme Court precedent regarding Congress's ability to pass retroactive legislation is incorrect. *Eastern Enterprises* addresses an

[6] BST questions whether a lawsuit, short of a final judgment, is even property which can be the subject of a taking.

entirely different point from the alleged retroactivity of the legislation in this case, namely, whether Congress may force a company to pay the unbargained-for health and pension benefits of employees who worked for it twenty to fifty years earlier. *Eastern Enterprises* does not overturn prior precedent regarding Congress's ability to pass retroactive legislation. Indeed, *Eastern Enterprises* approvingly cites *Landgraf* – the case on which the District Court relied in rejecting Petitioners' claims.

The instant case also is a particularly poor vehicle to elaborate on the plurality opinion in *Eastern Enterprises*, both because of Petitioners' procedural errors in this case and because none of the factors which informed the Court's opinion in *Eastern Enterprises* is present here. Specifically, the plurality in *Eastern Enterprises* found the Coal Industry Retiree Health Benefit Act (the "Coal Act") unconstitutional because it imposed a severe, disproportionate, and extremely retroactive liability on a limited class of parties who could not have anticipated the liability. In the instant case, there was no retroactive liability imposed. Here, also, the collective bargaining agreement established the parties' expectation that Petitioners would not receive pay for commuting time. The Act merely confirmed the lawfulness of the relationship established by the collective bargaining agreement. Thus, none of the factors that led the plurality to declare the Coal Act unconstitutional is present in the instant matter.

Because Petitioners' cited caselaw is inapposite, certiorari should be denied.

## IV. CONCLUSION

For the reasons described above, Petitioners' Petition for Writ of Certiorari is not well-taken and should be denied. BST also asks that the Court impose costs and fees on Petitioners to discourage frivolous petitions for writs of certiorari such as this one.

Respectfully submitted,

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U.S. DEPARTMENT OF LABOR
SECRETARY OF LABOR
WASHINGTON, D.C.

OCT 19 1994

The Honorable William D. Ford
Chairman, Committee on
Education and Labor
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

Thank you for your interest in the Department's interpretation of the Fair Labor Standards Act (FLSA) on the compensability of certain travel time between home and work of employees who drive employer's vehicles to transport equipment needed to perform their job. I appreciate your calling to our attention the potential consequences of this interpretation of the law.

As you may know, the Department of Labor's Wage and Hour Division published an opinion letter on August 5, 1994, which sets forth our interpretation of the FLSA in certain circumstances. While this opinion reflects a long-standing interpretation of the Department, dating at least to 1967, the recent opinion letter was published to clarify issues that arose in complaint-based investigations involving home heating oil service technicians in the New York metropolitan area. Thus, the current concerns seem to arise not from the promulgation of a new Departmental policy, but rather the application of an existing policy in an industry where established employment practices had not previously been reviewed.

Nonetheless, in light of the concerns you have raised and the possible effects of applying this interpretation in, among others, the home heating oil industry, I have decided to defer any Departmental efforts to enforce this policy while we undertake a review. You should know, however, that while this review goes on, employees retain their private right to litigate to obtain compliance with the requirements of the FLSA.

Again, thank you for bringing these important issues to my attention. I hope that you will find this action responsive to your concerns.

Sincerely,

/s/ Robert B. Reich
ROBERT B. REICH

U.S. Department of Labor [LOGO]

Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

APR 3 1995

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Washington, D.C. 20005-2301

Gentlemen:

This is in further regard to the Department of Labor's interpretation under the Fair Labor Standards Act (FLSA) of the compensability of time spent by employees voluntarily driving their employers' vehicles between home and customers' work sites each day, transporting parts, tools, equipment, etc., needed to perform their jobs. Our interpretation was set forth in an opinion letter dated August 5, 1994.

We have continued to review this matter since issuance of the August 5 opinion letter. We note that driving between work sites is a necessary component of the job which is performed throughout the day and is a principal activity of the employees. Furthermore, the employee may not leave the employer's vehicle at the site of the last service call, but must drive it to a location satisfactory to the employer for security – the employer's establishment, a garage, or the employee's home.

We are also aware, however, that driving from home to work is an activity which is not ordinarily compensable,

and that the employees in question have chosen to drive the employer's vehicle home rather than to the employer's yard for their own personal convenience and benefit.

We have, therefore, concluded that a balancing of the interests of employers and employees is appropriate. Accordingly, where the following circumstances exist, time spent traveling between the employee's home and the first work site of the day and between the last work site of the day and the employee's home need not be compensated: (1) driving the employer's vehicle between the employee's home and customers' work sites at the beginning and end of the workday is strictly voluntary and not a condition of employment; (2) the vehicle involved is the type of vehicle that would normally be used for commuting; (3) the employee incurs no costs for driving the employer's vehicle or parking it at the employee's home or elsewhere; and (4) the work sites are within the normal commuting area of the employer's establishment.

Our opinion letter of August 5, 1994, is hereby withdrawn.

Sincerely,

/s/ Maria Echaveste
Maria Echaveste
Administrator

N94233

**IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE WESTERN DIVISION AT MEMPHIS**

(1) BARNEY DOYLE, for and in behalf of himself and other employees similarly situated,

(2) JOSEPH CUNETTA, et al.,

*Plaintiffs,*

No. 94-2978 D

vs.

(1) BELLSOUTH COMMUNICATION SYSTEMS, INC., a subsidiary of BELLSOUTH CORPORATION, d/b/a BELLSOUTH TELECOMMUNICATIONS,

(2) BELLSOUTH TELECOMMUNICATIONS, INC., etc.,

*Defendants.*

*PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT PREMISED UPON P.L. 104-188, §§ 2101-2103*

## I. INTRODUCTION

Relying upon P.L. 104-108, §§ 2102-2103, August 20, 1996, which amended § 4(a) of the Portal-To-Portal Pay Act ("the Portal Act"), 29 U.S.C. § 254(a), Defendants BellSouth Communication Systems, Inc. ("BSCS") and

BellSouth Telecommunications, Inc. ("BST"), have moved in the above styled, related overtime compensation lawsuits for summary judgments of dismissal.

As established in this memorandum of law, the summary judgment motions of BSCS and BST should be denied because:

> (A) there exist **genuine issues of material fact** whether the Plaintiffs, as participants in the BSCS and BST "Home Dispatch Programs",
>
> > (1) used company vehicles for a purpose, other than "for travel", which was "integral and indispensable" to their "principal activity,
> >
> > (2) were "commuting" in company vehicles, and
> >
> > (3) were engaged in a "principal activity" when they received their daily first job assignments by electronic means "off the clock" (also known as "connect time"); and
>
> (B) due to the absence of the requisite legislative findings, the Due Process Clause of the Fifth Amendment to the United States Constitution ("the Due Process Clause") bars the retroactive application of P.L. 104-188, §§ 2101-2103, to Plaintiffs' claims against BSCS and BST for overtime compensation.

## II. THE HISTORICAL SETTING

Prior to the enactment of P.L. 104-188, *supra*, § 4(a) of the Portal Act, 29 U.S.C. § 254(a), in pertinent part provided:

> "No employer shall be subject to any liability or punishment under the [Fair Labor Standards Act] on account of the failure of such employer to pay an employee . . . overtime compensation, for or on account of any of the following activities of such employee . . .
>
> > (1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and
> >
> > (2) activities which are preliminary to or postliminary to said principal activities . . . "

In *Baker v. GTE North, Inc.*, 927 F. Supp. 1104, 3 Wage & Hour Cases 2d (BNA) 527, 1996 U.S. Dist. LEXIS 6880 (N.D. Ind., February 21, 1996), the District Court examined a telephone company's Home Dispatch Program which was **virtually identical** to the BSCS and BST Home Dispatch Programs and concluded that the participating service technician employees were entitled to receive overtime compensation under the Fair Labor Standards Act for the time they spent travelling daily in company-owned vehicles from their homes to their first job assignments and from their last job assignments to their homes.[1]

Six (6) months after the decision in *Baker v. GTE North, Inc., supra,* Congress enacted §§ 2102 and 2103 of P.L. 104-188, which read:

---

[1] Plaintiffs contend that *Baker v. GTE North, Inc., supra,* was correctly decided. BSCS and BST contend to the contrary.

"**§ 2102** Section 4(a) of the Portal-to-Portal Act of 1947, 29 U.S.C. 254(a)) is amended by adding at the end the following: For purposes of this subsection, the use of an employer's vehicle for travel by an employee and activities performed by an employee which are incidental to the use of such vehicle for commuting shall not be considered part of the employee's principal activities if the use of such vehicle for travel is within the normal commuting area for the employer's business or establishment and the use of the employer's vehicle is subject to an agreement on the part of the employer and the employee or representative of such employee.

**§ 2103** The amendment made by section 2102 shall take effect on the date of the enactment of this Act and shall apply in determining the application of section 4 of the Portal-to-Portal Act of 1947 to an employee in any civil action brought before such date of enactment but pending on such date."

## III. THE PARTIES' CONTENTIONS

In their motions for summary judgment of dismissal, BSCS and BST contend that P.L. 104-188, §§ 2102-2103, *supra*.

(1) as a matter of law, nullified Plaintiffs' claims for overtime compensation; and

(2) is retroactively applicable to Plaintiffs' claims against BSCS and BST for overtime compensation pending herein, and is unaffected by any limitations generally imposed on such retroactivity by the Due Process Clause of the U.S. Constitution.

Plaintiffs, however, contend that the entry of summary judgments in favor of BSCS and BST would be erroneous because the August 20, 1996, amendment to § 4(a) of the Portal Act, 29 U.S.C. § 254(a)

> (1) did *not*, as a matter of law, nullify Plaintiffs' claims for overtime compensation; and
>
> (2) due to the absence of the requisite legislative findings, cannot be retroactively applied to Plaintiffs' claims against BSCS and BST for overtime compensation.

## IV. DISCUSSION AND ARGUMENT

### A. The Existence Of Genuine Issues Of Material Fact

In *Nichols v. City of Chicago*, 789 F. Supp. 1438 (N.D. Ill. 1992), canine patrol officers brought an action under the Fair Labor Standards Act to recover compensation for home dog-care activities. The City moved for summary judgment. Denying that motion, Judge Alesia stated:

> "Whether an activity is preliminary or postliminary to a principal activity is a question of fact . . . " (Citations omitted)

789 F. Supp. at 1441.

The defendant's motion for summary judgment was denied in *Lee v. Am-Pro Protective Agency, Inc.*, 860 F. Supp. 325 (E.D. Va. 1994), in which security guards sought overtime compensation for the time it took them to change into and out of their uniforms, on site. Judge Brinkema explained:

> "Summary judgment is only appropriate where no genuine issue of material fact is in dispute . . . In deciding whether to grant summary judgment, all reasonable inferences must be drawn in favor of the non-moving party . . .
>
> "Drawing all inferences in the light most favorable to the non-moving party, there is ample evidence in the record that would support a finding that being in uniform, and therefore, putting on the uniform, is an integral and indispensable part of the Am-Pro security guards' principal activity, because it is both done for the benefit of the employer, and is necessary to the performance of the guards' principal activity . . . " (Citations omitted)

860 F. Supp. at 327-328.

In *McGrath v. City of Philadelphia*, 864 F. Supp. 466 (E.D. Pa. 1994), an action by city police department employees of varying ranks for overtime compensation under the Fair Labor Standards Act, the District Court denied cross-motions for summary judgment. Judge Hutton noted:

> "In Count II of the Complaint, the plaintiffs allege that the City has violated the FLSA overtime provisions by failing to compensate certain sergeants and lieutenants who routinely come to work fifteen minutes early in order to prepare roll call for the officers coming on duty for that shift. The City argues that there is a genuine issue of material fact of the issue of whether the plaintiffs' roll call activities constitute compensable work, and that, accordingly, summary judgment is inappropriate. It is the plaintiffs' burden to establish that a given activity constitutes

work. *See McIntyre v. Division of Youth Rehabilitation Services*, 796 F. Supp. 668, 673 (D.Del. 1992).

"The Portal-to-Portal Act of 1947 provides in relevant part than an employer need not compensate its employees for activities that are 'preliminary to or postliminary to' the 'principal activity or activities' that an employee is engaged to perform, unless the employer is otherwise required to compensate its employees for such work by custom, contract or practice . . . 29 U.S.C. § 254(a)(2). The term 'principal activity or activities' includes all activities that are 'integral and indispensable' to the principal activity. *Steiner v. Mitchell*, 350 U.S. 247, 253, 76 S. Ct. 330, 334, 100 L. Ed. 267 (1956); *Brusstar v. Southeastern Pennsylvania Transportation Authority*, 636 F. Supp. 1557, 1558 (E.D. Pa.1986). To determine whether an activity is 'integral and indispensable' to the principal activity, the court must inquire into "whether [the activities] are performed as part of the regular work of the employees in the ordinary course of business", *Truslow v. Spotsylvania County Sheriff*, 783 F. Supp. 274, 177 (E.D. Va. 1992), *quoting Dunlop v. City Electric, Inc.*, 527 F. 2d 394, 401 (5th Cir. 1976)).

"There is a genuine issue of material fact precluding the entry of summary judgment on the sergeants' and lieutenants' pre-shift roll call claims. The plaintiffs have directed the Court to evidence that sergeants and lieutenants do 'occasionally' arrive prior to roll call to prepare and be ready to conduct roll call at the beginning of the shift . . . This alone is insufficient to establish that pre-shift roll call preparation was 'integral and indispensable' to sergeants' and

> lieutenants' principal activities. Further, the Court cannot determine what sergeants' and lieutenants' *principal* activity was from the evidence adduced by the plaintiffs. Accordingly, the Court cannot make any determination as to the relationship between roll call activities and sergeants' and lieutenants' other duties, let alone a determination that there was an 'integral and indispensable' relationship between the two.
>
> "Moreover, there is evidence in the record that the plaintiffs are responsible for reporting their 'time in' and 'time out' to personnel in the operations room, who then prepare a Daily Attendance Report ('DAR') . . . Plaintiffs, usually lieutenants, sign off attesting to the accuracy of records demonstrating the amount of time they spend engaging in pre-shift activities . . . The City has produced evidence that the plaintiffs' attendance records do not reflect the alleged pre-shift activities for which they seek to recover in Count II . . . After reviewing the evidence currently in the record and identified by the parties, the Court holds that a reasonable trier of fact could find that the alleged pre-shift activities are not an 'integral and indispensable' part of sergeant and lieutenant plaintiffs' principal activity. Accordingly, the plaintiffs' motion for summary judgment on the issue of pre-shift roll call preparation is denied." (Footnote omitted)

864 F. Supp. 482-483.

For the reasons that follow, the enactment of P.L. 104-188, §§ 2102-2103, does not, by itself, entitle BSCS and BST to summary judgments of dismissal in these lawsuits.

**(1) There Exists A Genuine Issue Of Material Fact Whether Plaintiffs Used Company Vehicles For A Purpose, Other Than "For Travel", Which Was "Integral And Indispensable" To Their "Principal Activity" And Which Benefited BSCS And BST.**

The plain meaning of the 1996 amendment to the Portal Act is that an employee who uses an employer's vehicle *solely* "for travel" is not entitled to compensation therefor under the Fair Labor Standards Act. By inference, however, an employee who uses an employer's vehicle "for travel" *and* for another purpose "integral and indispensable" to his or her "principal activity" which benefits his or her employer is entitled to receive [overtime] compensation under the Fair Labor Standards Act for his or her performance of the latter function.

There exists a genuine issue of material fact whether Plaintiffs, as participants in the BSCS and BST Home Dispatch Programs, satisfied the "another purpose" criterion when they transported tools and equipment in company vehicles to and from the work sites designated by BSCS and BST. On this point, Judge Miller's following observations in *Baker v. GTE North, Inc., supra,* militate against the entry of summary judgments in favor of BSCS and BST in these cases:

> "Under *Dunlop's* test, the plaintiffs' driving is principal if it is done 'as part of the regular work of the employees in the ordinary course of business', and is 'necessary to the business and is performed by the employees, primarily for the benefit of the employer, in the ordinary course of that business'. *Dunlop,* 527 F.2d at 401. Transporting tools and equipment to work sites is part of the plaintiffs' regular work, done in

the ordinary course of business. All facility maintainers, not just those participating in the HDP, must transport their tools and equipment to the work site to perform their duties. The transporting of tools and equipment in the GTE vehicles is also necessary to the business' of repairing and maintaining telephone and transmission equipment, and is done for the benefit of GTE. The Home Dispatch Program benefits the plaintiffs, but the transporting of necessary tools and equipment is integral to the performance of their duties, and primarily benefits GTE.

"The plaintiffs' driving is not merely preliminary or postliminary to their principal activities because it is not an activity 'predominantly . . . spent in [the employees'] own interests, from which no benefit [ ] inure[s] to the company'. *Dunlop*, 527 F.2d at 398. Transporting the necessary tools and equipment is not an activity 'undertaken for [the employees'] own convenience, not being required by the employer and not being necessary for the performance of their duties for the employer'. *Id.* Parking the vehicles at home or other alternatives to the facility is for the employees' convenience, but getting the vehicle and its contents to and from the first and last work sites is not for the employees' convenience; it is an integral and indispensable part of their jobs. *See Crenshaw v. Quarles Drilling Corp.*, 798 F. 2d 1345, 1350 (10th Cir. 1986) (oil rig mechanics' driving of specially-equipped trucks containing tools and equipment necessary to servicing oil rigs found compensable); *Secretary of Labor v.*

> *E.R. Field, Inc.*, 495 F. 2d 749, 751 (1st Cir.1974) (same; electrician driving back to shop in truck containing tools and supplies necessary for job); *DA & S Oil Well Servicing, Inc. v. Mitchell*, 262 F.2d 552, 555 (10th Cir.1958) (same; employees transporting equipment for oil well servicing). And, as in *Dunlop*, the activities are those for which the employees would ordinarily have been paid had been paid had such work been performed during the normal workday'. *Dunlop*, 527 F. 2d at 401; *see also Graham*, 828 F. Supp. at 582, n. 3. Importantly, all facility maintainers are paid for the time they spend driving between work sites during the workday."

927 F. Supp. at 1114.

House Report 104-585, May 20, 1996, issued by the Committee on Economic and Educational Opportunities to accompany H.R. 1227, stated:

> "Merely transporting tools or supplies should not change the noncompensable nature of the travel . . . "

House Report No. 104-585, p. 5. Although perhaps indicative of Congress's desire to overturn the Federal Courts' "transporting tools and equipment" decisions and the Wage and Hour regulations upon which they were premised, the foregoing pronouncement has no corollary in the text of the 1998 amendment, other than the ambiguous phrase "incidental to the use of such vehicle for commuting".

Under these circumstances, whether Plaintiffs' transportation in company vehicles of tools, equipment and

supplies to and from their daily work sites constituted a "principal activity" or an "activity incidental to the use of such vehicle" presents a genuine issue of material fact, to be resolved by the jury following a trial.

**(2) There Exists A Genuine Issue Of Material Fact Whether Plaintiffs Were "Commuting" While They Participated In The BSCS And BST Home Dispatch Programs.**

Prior to its amendment in 1996, § 4(a) of the Portal Act, 29 U.S.C. § 254(a), did not employ the term "commuting". The 1996 amendment to § 4(a) of the Portal Act, 29 U.S.C. § 254(a), introduced, but did not define, that term.

Plaintiffs contend that the term "commuting", as used in the amended § 4(a) of the Portal Act, 29 U.S.C. § 254(a), does not apply to their daily travels in BSCS and BST vehicles from their homes to their first work sites and from their last work sites to their homes because their first and last work sites varied from day-to-day.

BSCS and BST, however, asserts that Plaintiffs' daily travels in company vehicles from their homes to their first work sites and from the last work sites to their homes constituted "commuting" for purposes of the amended § 4(a) of the Portal Act, 29 U.S.C. § 254(a).

House Report 104-585, *supra*, did not define "commuting". Instead, at pp. 5-6, it provided the following "guidance" on this subject:

> "It is important to address two issues which are not specifically covered by H.R. 1227 but which have been raised in conjunction with it. The first

issue concerns the type of vehicle used for commuting. To be considered noncompensable travel time, the courts and the Department of Labor have generally considered that driving a company vehicle be similar to commuting in a private vehicle. The fact that a vehicle may have been modified for special purposes, displays company logos, or is specially equipped does not alter the nature of such travel.

"While H.R. 1227 does not specifically address this issue, it is the intent of the Committee that the vehicle should be of a type that does not impose substantially greater difficulties to operate than the type of vehicle which would normally be used for commuting. The fact that the vehicle may have been modified to meet the employer's specifications or requirements should not be considered a determining factor.

"The second issue concerns cost to the employee for use of the employer's vehicle. It is the intent of the Committee that the employee incur no out-of-pocket or direct cost for driving, parking or otherwise maintaining the employer's vehicle in connection with commuting in employer-provided vehicles. However, the employer shall not be responsible for unrelated expenses, such as an employee's tax liability under the provisions of the Internal Revenue Code which may result from the employee's personal use of the employer's vehicle or for traffic violations resulting from the improper operation of the vehicle by the employee."

In the absence of a statutory definition of "commuting", the question whether Plaintiffs "commuted" daily from their homes to their first work sites and from their

last work sites to their homes in BSCS and BST vehicles does not present an issue of law, but a genuine and material factual one to be resolved by the jury following a trial.

**(3) There Exists A Genuine Issue Of Material Fact Whether Plaintiffs Were Engaged In A "Principal Activity" When They Received Their Daily First Job Assignments From BSCS And BST By Electronic Means "Off The Clock" (Also Known As "Connect Time").**

In *Baker v. GTE North, Inc., supra,* Judge Miller stated:

> "In *Dunlop,* the Fifth Circuit reversed the decision of the district court because it 'gave a narrower interpretation of the F.L.S.A. and a broader interpretation of the Portal Act exemption that [it thought] warranted by the legislative history of the statutes or by the decisions construing them'. *Id.* at 400. The Fifth Circuit rejected the district court's 'directly related to' test, and found that the plaintiff electricians' pre-shift activities, including the filling out time sheets, checking job locations, cleaning out and loading their trucks with the necessary materials, fueling the trucks, and picking up the electrical plans for the day's jobs, were within the broad range of "principal activities" performed at their employer's behest and for the benefit of the business'. These activities would have been compensable had they been performed during the course of the workday."

927 F. Supp. at 1112.

Plaintiffs contend that they are entitled to receive overtime compensation for their "connect time", which they characterize as a "principal activity" for purposes of § 4(a) of the Portal Act, 29 U.S.C. § 254(a).

However, BSCS and BST contend the Plaintiffs' "connect time" is noncompensable because it was "incidental" to Plaintiffs' use of BSCS and BST vehicles for commuting.

"Connect time" was not addressed in P.L. 104-188, § 2101. However, House Report 104-585, *supra*, at page 5, in pertinent part stated:

> "Activities which are merely incidental to the use of an employer-provided vehicle for commuting at the beginning and end of the workday are similarly not considered part of the employee's principal activity or activities and therefore need not be compensable. It is not possible to define in all circumstances what specific tasks and activities would be considered incidental' to the use of an employer's vehicle for commuting. Communication between the employee and the employer to receive assignments or instructions, or to transmit advice on work progress or completion, is required in order for these programs to exist . . . The Committee expects that the Department of Labor will provide guidance in this area, consistent with the purposes of H.R. 1227."

The foregoing committee pronouncement has no corollary in the text of the 1996 amendment to § 4(a) of the Portal Act, 29 U.S.C. § 254(a), other than the ambiguous phrase "incidental to the use of such vehicle for commuting". Under these circumstances, for purposes of the

BSCS and BST motions for summary judgment, the question whether Plaintiffs' "connect time" was a compensable "principal activity" or a noncompensable activity "incidental" to their use of company vehicles to commute presents not a question of law, but a genuine issue of material fact to be resolved by the jury following a trial.

**B. Due To The Absence Of The Requisite Legislative Findings, The Due Process Clause Bars The Retroactive Application Of P.L. 104-188, §§ 2102-2103. To Plaintiffs' Claims Against BSCS And BST For Overtime Compensation.**

In *Tennessee Coal Co. v. Muscoda Local,* 321 U.S. 590 (194___), *Jewell Ridge Co. v. Local No. 6167,* 325 U.S. 161 (194___), and *Anderson v. Mt. Clemens Pottery Co.,* 328 U.S. 680 (194___), the Supreme Court held compensable under the Fair Labor Standards Act time that employees were required to be on their employers' premises before and after their shifts for the purposes of changing clothes and walking to and from the places where the work was carried on. Congress responded to those decisions by enacting the Portal Act, which it indeed directed be applicable to pending actions for overtime compensation. In passing the Portal Act, Congress made the following factual findings:

> "The Congress hereby finds that the Fair Labor Standards Act of 1938, as amended, has been interpreted judicially in disregard of long-established customs, practices, and contracts between employers and employees, thereby creating wholly unexpected liabilities, immense in amount and retroactive in operation, upon employers with the results that, if said Act as so

interpreted or claims arising under such interpretations were permitted to stand, (1) the payment of such liabilities would bring about financial ruin of many employers and seriously impair the capital resources of many others thereby resulting in the reduction of industrial operations, halting of expansion and development, curtailing employment and the earning power of employees; (2) the credit of many employers would be seriously impaired; (3) there would be created both an extended and continuous uncertainty on the part of industry, both employer and employee, as to the financial condition of productive establishments and a gross inequality of competitive conditions between employers and between industries; (4) employees would receive windfall payments, including liquidated damages, of sums for activities performed by them without any expectation of reward beyond that included in their agreed rates of pay; (5) there would occur the promotion of increasing demands for payment to employees for engaging in activities no compensation for which had been contemplated by either the employer or employee at the time they were engaged in; (5) voluntary collective bargaining would be interfered with and industrial disputes between employees and employers and between employees and employees would be created; (7) the courts of the country would be burdened with excessive and needless litigation and champertous practices would be encouraged; (8) the Public Treasury would be deprived of large sums of revenues and public finances would be seriously deranged by claims against the Public Treasury for refunds of taxes

> already paid; (9) the cost to the Government of goods and services heretofore and hereafter purchased by its various departments and agencies would be unreasonably increased and the Public Treasury would be seriously affected by consequent increased cost of war contract; and (10) serious and adverse effects upon the revenues of Federal, State, and local governments would occur.
>
> "The Congress further finds that all of the foregoing constitutes a substantial burden on commerce and a substantial obstruction to the free flow of goods in commerce.
>
> "The Congress, therefore, further finds and declares that it is in the national public interest and for the general welfare, essential to national defense, and necessary to aid, protect, and foster commerce, that this Act be enacted . . . "

Relying upon the foregoing legislative findings, the Federal Courts consistently held that the Portal Act could rationally and constitutionally be retroactively applied to nullify pending claims for overtime compensation under the Fair Labor Standards Act **as long as certain circumstances exist**. *See, e.g., Seese v. Bethlehem Steel Co.,* 168 F.2d 58 (4th Cir. 1948), *Darr v. Mutual Life Insurance Co. of New York,* 169 F.2d 262 (2nd Cir.), *cert. denied,* 335 U.S. 871, (1948), and *Markert v. Swift & Co., Inc.,* 173 F. 2d 517 (2nd Cir. 1949).

In *Rhinebarger v. Orr,* 839 F. 2d 387 (7th Cir. 1988), the Court of Appeals held that Congress' amendment to the Fair Labor Standards Act which stayed for one (1) year

the effect of the decision in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), did not violate the due process rights of Indiana State Police officers who had filed suit prior to the amendment. Citing the decision in *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717 (1984), for the proposition that congressional legislation meets the test of due process if the retroactive application of the legislation is itself justified by a **rational legislative purpose**, the Seventh Circuit declared:

> "Plaintiffs have failed to meet their burden of showing that the 1985 FLSA Amendment is irrational. Plaintiffs make little effort to argue that the 1985 Amendment does not fulfill a legitimate and rational legislative purpose. The Senate Report to the Amendment explains the purpose of the retroactive provisions: 'The Committee has deferred application of the FLSA overtime provisions until exactly one year after the mandate in *Garcia* so that state and local governments may make necessary adjustments in their work practices, staffing patterns, and fiscal priorities'. S.Rep. No. 99-159 at 15, 99th Cong., 1st Sess. 2, *reprinted in* 1985 U.S. Code Cong. & Ad. News 651, 663. Thus we conclude that Congress acted for the rational purpose of protecting the fiscal integrity of the states and their political subdivisions." (Footnote omitted)

839 F.2d at 388-389.[2] *See, also, Austin v. City of Bisbee*, 855 F.2d 1429, 1434-1437 (9th Cir. 1988).

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[2] Footnote 3 to the Seventh Circuit's decision in *Rhinebarger v. Orr*, 839 F. 2d at 389, quoted at great length the Senate Committee's discussion carefully balancing employee rights under the Fair Labor Standards Act against the demands upon

In enacting the 1996 amendment to the Portal Act, Congress did not find that only retroactive application would protect affected employers from unexpected hardships. Instead, House Report 104-585, at p. 6, observed:

> "Section 2 of H.R. 1227 makes the bill effective upon enactment and applicable to civil actions pending on the date of enactment, in which a final decision has not been entered. It clarifies a provision of the law that has been the subject of inconsistent and contradictory interpretations by the Department of Labor and the courts. The purpose of H.R. 1227 is to clarify the intent of the Portal-to-Portal Act as it applies to employee use of employer-provided vehicles for commuting at the beginning and end of the workday. It is therefore appropriate to apply the clarification to pending cases, as well as to future programs established by employers and employees. H.R. 1227 addresses a provision of law that has been ambiguous and the source of conflicting and contradictory interpretations by the Department of Labor. Thus, it is fair and reasonable to apply the clarification to pending cases as well as to any future situations."[3]

---

the fiscal resources of the States and their political subdivision as a consequence of the *Garcia* decision of the Supreme Court.

[3] The Minority Views, which accompanied House Report No. 104-585, at p. 13 observed:

> "H.R. 1227 applies retroactively to pending litigation, notwithstanding the fact that the bill bears little relationship to the April 3 DOL opinion, or to any other previous policy enunciated by the Department of Labor regarding the treatment of time spent commuting in an employer-owned vehicle. In short, the bill substantially modifies current law and

The retroactive application of the 1996 amendment to the Portal Act to terminate these lawsuits would **violate the Due Process Clause** because, in 1989 and 1990, the Wage and Hour Division, U.S. Department of Labor put BST (and, by inference, its subsidiary, BSCS) on **express notice** that BST's failure to compensate its Home Dispatch Program participants for daily travel in company-provided vehicles from their homes to their first work sites and from their last work sites to their homes and for "connect time" **violated** the Fair Labor Standards Act.

## V. CONCLUSION

The motions of BSCS and BST for summary judgments of dismissal in these lawsuits should be denied.

Respectfully submitted,

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intentionally seeks to immunize employers who violated the law."

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